APPEAL NO. 010267

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 3, 2001. The hearing officer determined that the appellant (claimant) was not the employee of (client company) at the time of his motor vehicle accident (MVA) on _____. She further held that the claimant's accident prevented him from obtaining and retaining employment at his prior income level for the period from June 30 through September 21, 2000.

The claimant appeals and argues that he was an employee of the client company at the time of his accident because it had the right to control the details of his work. He further argues that he had the inability to work after September 21, 2000. There is no response from the respondent (carrier).

DECISION

We affirm the hearing officer's decision.

The hearing officer has fairly summarized the evidence. In reviewing that evidence, we cannot agree that the hearing officer erred in her findings on the appealed issues. The claimant was hired by (delivery service) to drive one of that company's trucks in order to make deliveries for the client company. The claimant said that he reported each morning to the client company in the provided truck, and was given his inventory of materials and destinations of deliveries for these materials. He said that he had two basic routes. The claimant was hired by the owner of the delivery service, Mr. V. Although there was testimony from Mr. D, an operations manager for the client company, and Mr. V that a written contract existed between the delivery service and the client company, and the hearing officer asked that this be produced after the CCH, it was asserted thereafter by the attorney for the carrier that no contract was in existence and that there was nothing more than billing statements, showing an amount paid each day to the delivery service for the truck and driver. Only a contract with the claimant, describing him as an independent contractor retaining control over the details of his work, which is described as delivery for the delivery service's customers, was produced.

The injury sustained by the claimant, in an MVA which was not his fault, was a broken leg and fractured foot. He had been employed about two and one-half days at that time. He said that he was in a hip cast and did not walk without a walker for two months. The claimant said he was released by his doctor to light duty on September 21, 2000, with the restriction not to lift more than 50 pounds.

As the hearing officer noted, the relationship between the delivery service (which did not have benefits or withhold income tax for its drivers) and the claimant was not in issue. The contract between the delivery service and the claimant is not irrelevant, however, because it makes clear that the delivery company is in the business of making

deliveries for its own customers, and disclosed this to the claimant, who was hired to drive its trucks. The claimant has also testified that he knew and understood the delivery service to be the owner of the trucks he drove. The contract expressly contemplates that the claimant will take some direction from the client company as to the time constraints and conditions of delivery of its goods. The Appeals Panel has previously noted that state law regarding certified carriers and motor carriers appears to preclude transfer of operational control over the trucks to another company that is not a certificated motor carrier. *See* Texas Workers' Compensation Commission Appeal No. 92039, decided March 20, 1992. For these reasons, we agree with the hearing officer that the instruction given to the claimant by the client company does not constitute an assumption of control such that an employer-employee relationship resulted.

The hearing officer did not err in limiting any possible period of "disability" (in the event that the claimant was found to be the client company's employee) to the period she found. We stress that medical evidence is not required to prove disability; however, a trier of fact may choose to disbelieve testimony which is not otherwise supported. In this case, she may have believed that the type of injury involved had resolved sufficiently by the time of the claimant's light-duty release so that employment was no longer precluded.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge